Filed 9/18/15 P. v. Garcia CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICHARD PAUL GARCIA, Defendant and Appellant.	B257979 (Los Angeles County Super. Ct. No. BA422179)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Joseph R. Escobosa, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Richard Paul Garcia was convicted of assault with a deadly weapon and elder abuse. He contends the trial court improperly excluded evidence material to his theory of self-defense. We reject appellant's contention, and therefore affirm.

RELEVANT PROCEDURAL BACKGROUND

On April 11, 2014, an information was filed, charging appellant with assault with a deadly weapon on Telesforo Arellano Diaz (Pen. Code, § 245, subd. (a)(1)), and elder abuse against Eduardo Betancourt (Pen. Code, § 268, subd. (b)(1)). Accompanying the charge of elder abuse were allegations that appellant personally used a deadly or dangerous weapon (Pen. Code, § 12022, subd. (b)(1)) and personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (c)). Appellant pleaded not guilty and denied the special allegations.

A jury found appellant guilty as charged, and found the special allegations to be true. On July 29, 2014, the trial court sentenced appellant to a total term of eight years in prison.

FACTUAL BACKGROUND

A. *Prosecution Evidence*

Eduardo Betancourt testified that he was born in 1935, and was nearly 79 years old at the time of appellant's trial, which occurred in July 2014. On March 4, 2014, at approximately 5:00 p.m., Betancourt was collecting recyclable cans and bottles in Montebello. To assist his search for recyclables in trash cans, he carried a three-foot wooden "mop stick," which resembled a mop handle with a detached head. Attached to the stick was a nail that permitted Betancourt to hook cans. While Betancourt gathered some collectables from a trash can, he leaned the stick against the can.

Appellant approached Betancourt and spoke in English, which Betancourt does not understand. Before that moment, Betancourt had never encountered appellant. When Betancourt replied, "No English," appellant hit Betancourt's head with his hand, knocking him down. While Betancourt lay on the ground, appellant repeatedly hit him with his hands, and kicked him several times. Appellant then seized Betancourt's stick and struck him twice with it, fracturing Betancourt's finger. During the beating, appellant broke Betancourt's stick. Betancourt cried out for help, but neither punched nor kicked appellant. When appellant tried to hit Betancourt with a bottle, Betancourt pushed appellant's head down and grabbed his ponytail. Appellant attempted to run away, but was detained by bystanders and police officers.

Telesforo Arellano Diaz testified that on the date of the incident, he was leaving a restaurant when he heard cries for help from the area of a nearby dumpster. Diaz ran to the dumpster, where he saw Betancourt attempting to defend himself from appellant, who was preparing to hit Betancourt with a bottle. When Diaz asked, "Why are you hitting him?," appellant threatened Diaz with the bottle. To ward off the bottle, Diaz picked up a piece of pipe. Appellant threw the bottle at Diaz, who lunged at appellant in order to restrain him. As they struggled, appellant bit Diaz. Two other men helped Diaz hold appellant until police officers arrived.

Melissa Vera testified that on March 4, 2014, she was talking to Diaz in her employer's parking lot when she heard noises from a trash enclosure in the lot. She saw appellant leave the enclosure carrying a beer bottle, followed by an injured elderly man. Appellant appeared to be "aggravated." While some men detained appellant, Vera made a 911 call to report the injured man. [1]

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[1] An audio recording of Vera's 911 call was played for the jury.

Montebello Police Department Officer Stephen Sharpe testified that he responded to a call regarding the incident, and saw three men holding appellant when he arrived. After arresting appellant, Sharpe interviewed him. Appellant said that after filling a shopping cart with recyclable cans, he left it unattended while he entered a market. When he returned, the cart was missing. Appellant saw a man with a stick digging in a dumpster, and asked whether he had stolen the cart. When the man denied doing so, appellant punched him in the face. The man tried to hit appellant with the stick, and a fight began.

B. *Defense Evidence*

Appellant testified that on March 4, 2014, he was 39 years old, and that he had never encountered Betancourt or Diaz before that date. According to appellant, he entered a market in order to buy a pair of headphones. Outside, he left a shopping cart containing a backpack, a blanket, and some recyclables. Because he was homeless, the cart held personal property important to him.

Appellant further testified that when he returned, the cart and his belongings were gone. He looked for the missing items, and noticed Betancourt rummaging through a dumpster. After greeting Betancourt, appellant asked whether he had seen anyone pushing a shopping cart. Betancourt rudely said, "No, no," and raised a stick he held. Because Betancourt appeared to be preparing to strike a blow with the stick, appellant hit him. Betancourt stumbled and grabbed appellant, causing both to fall to the ground. Appellant stated that they hit each other as they rolled around, but denied that he kicked Betancourt or struck him with his stick. Appellant also stated that he picked up a bottle, but did not try to hit Betancourt with it.

Appellant further testified that when he freed himself from the struggle and tried to walk away, he saw Diaz holding a metal pipe or tube. Because Diaz

looked aggressive, appellant told Diaz to leave him alone. Fearing that Diaz intended to inflict a beating, appellant threw the bottle he was holding and tried to flee, but Diaz forced appellant to the ground and held him. Two other men assisted Diaz in detaining appellant until police officers arrived. Appellant testified that he could not remember speaking to Officer Sharpe.

DISCUSSION

Appellant contends the trial court incorrectly excluded as irrelevant certain evidence he offered to support his theory of self-defense, namely, his testimony that prior to March 4, 2014, he had been attacked while homeless. Appellant argues that the evidence showed that he reasonably believed Betancourt and Diaz threatened him with injury before he physically engaged with either of them. As explained below, he has shown no error in the court's ruling.

A. *Governing Principles*

The trial court's determinations of relevance under Evidence Code section 351 are reviewed for abuse of discretion. (*Spolter v. Four-Wheel Brake Service Co.* (1950) 99 Cal.App.2d 690, 699.) Here, our focus is on whether the court abused its discretion in excluding appellant's proposed testimony. At trial, appellant offered a theory of "perfect" self-defense. Generally, reasonable or "perfect" self-defense constitutes a complete exoneration from the crimes alleged against appellant. (See *People v. Minifie* (1996) 13 Cal.4th 1055, 1060, 1064-1065 (*Minifie*).) The defense "does not depend upon the existence of actual danger, but rather depends upon appearances . . . ." (*People v. Clark* (1982) 130 Cal.App.3d 371, 377, abrogated on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 92.) To establish the defense, the defendant need show only that he had "an honest

and reasonable belief in the need to defend himself . . . ." (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.)

As our Supreme Court has explained: "Although the belief in the need to defend must be objectively reasonable, a jury must consider what 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge . . . .' [Citation.] It judges reasonableness 'from the point of view of a reasonable person in the position of defendant . . . .' [Citation.] To do this, it must consider all the '"'facts and circumstances . . . in determining whether the defendant acted in a manner in which *a reasonable man* would act in protecting his own life or bodily safety.'"' [Citation.] As we stated long ago, ' . . . a defendant is entitled to have a jury take into consideration all the elements in the case which might be expected to operate on his mind . . . .' [Citation.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-83.)

B. *Underlying Proceedings*

During appellant's direct examination, the following colloquy occurred when defense counsel inquired regarding appellant's experiences before the underlying incident and his state of sobriety:

"Q. [by defense counsel]: Prior to this incident, had you ever been attacked before, physically?

"[Prosecutor]: Objection, relevance.

"The Court: It's sustained. Did you want to make an offer of proof at sidebar?

"[Defense counsel]: Yes, please. [¶] . . . [¶]

"The Court: We're at sidebar.

"[Defense counsel]: Your honor, I think it's relevant to his response. It will explain his response to what had happened, to what he thought was going to

happen with Mr. Betancourt, and the reason why he was trying to get away.

"The Court: [The] People want to be heard?

"[Prosecutor]: I think it's only relevant if he'd been attacked by Mr. Betancourt before.

"The Court: Yeah. The jury instruction specifically talks about either if he'd been attacked by Mr. Betancourt or if he had heard something about him that would cause him to think, from someone else, that Mr. Betancourt was likely to attack. [2][¶] That's the way the law is. It's not just [had he been] attacked by anyone else. That is the jury instruction. The People are right, and the objection [is] sustained."

C. *Analysis*

Appellant contends the trial court's evidentiary ruling improperly barred evidence relevant to the key issue presented by his theory of self-defense, namely, whether a reasonable person in appellant's position would have felt the need to defend himself against Betancourt and Diaz. As explained below, appellant has shown no error in the ruling.

Initially, we note that appellant has failed to preserve his contention for want of a sufficient offer of proof. "An appellate court may not reverse a judgment because of the erroneous exclusion of evidence unless the 'substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.'" (*People v. Livaditis* (1992) 2

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2 As the trial court instructed the jury regarding self-defense with a modified version of CALCRIM No. 3470, the court appears to refer to optional portions of that form instruction -- ultimately not provided to the jury -- stating that the victim's threatening conduct, and threats by third parties that the defendant reasonably associated with the victim, are relevant to the defense.

Cal.4th 759, 778, italics deleted, quoting Evid. Code, § 354, subd. (a).) As explained in *People v. Schmies* (1996) 44 Cal.App.4th 38, 53, "[a]n offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of [an] appeal[,] would provide the reviewing court with the means of determining error and assessing prejudice. [Citation.] To accomplish these purposes an offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued."

Instructive applications of the requirement for an offer of proof are found in *People v. Thomas* (1969) 269 Cal.App.2d 327 (*Thomas*) and *McCleery v. City of Bakersfield* (1985) 170 Cal.App.3d 1059 (*McCleery*). In *Thomas*, the defendant killed a person known as "Toughy" during a knife fight, and was charged with his murder. (*Thomas*, *supra*, 269 Cal.App.2d at p. 328.) At trial, the defendant claimed to have acted in self-defense. (*Id*. at p. 329.) After the defendant testified that he had fought Toughy before the fatal incident, the court sustained an objection to defense counsel's inquiry regarding the number of fights. (*Id*. at pp. 328-330.) The appellate court found no error in the ruling, as the defendant made no offer of proof describing the excluded evidence, and the record otherwise did not disclose any specific prior acts by Toughy known to the defendant establishing the reasonableness of his fear. (*Id*. at p. 329.) The court stated: "'The asking of questions, unless they disclose the proof expected to be adduced, is not the equivalent of an offer of proof.' [Citations.] The question asked, 'On more than one occasion?' does not reveal if the answer would have been 'Yes' or 'No.' Furthermore, the trial court was not advised what the evidence would be concerning any other fight and, for aught known, it might have disclosed that the witness, and not 'Toughy,' was the aggressor." (*Ibid*., quoting *People v. Danielly* (1949) 33 Cal.2d 362, 376.)

In *McCleery*, a judgment was entered against a police officer and a city in a wrongful death action, after the trial court excluded expert testimony intended to support the officer's theory of self-defense. (*McCleery*, *supra*, 170 Cal.App.3d at pp. 1061-1064.) The appellate court held that the police officer and city had shown no reversible error because their offer of proof merely "advised the trial court of the substance of the *facts* they intended to prove instead of the *evidence* to prove the facts." (*Id*. at p. 1073.) The appellate court stated: "A proper offer of proof -- setting forth the evidence to be presented through [the expert] . . . -- would have afforded the trial judge a reliable basis on which to evaluate [the expert], his proffered testimony and whether the latter would assist the jury.[] With such a showing, the court could have exercised its discretion with a clear understanding of what was involved in allowing [the expert] to testify." (*Id*. at p. 1074, italics deleted, fn. omitted.)

Appellant's offer of proof was inadequate, as it merely identified the facts he sought to prove, without describing the evidence he intended to provide. When asked for an offer of proof, defense counsel neither stated that appellant would answer the pending question affirmatively nor described any previous attacks on appellant. Absent such a description of the number and circumstances of previous attacks (if any), the trial court cannot be regarded as abusing its discretion in barring appellant's testimony.[3]

Furthermore, even had appellant preserved his contention, which assumes that he would have testified that he suffered previous attacks while homeless, we would reject the theory of self-defense offered on appeal. He does not suggest that

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[3] Appellant suggests that the trial court denied his counsel an adequate opportunity to present an offer of proof. However, the record discloses that the court imposed no restrictions on defense counsel when it requested an offer of proof.

those attacks involved Betancourt or Diaz. Rather, he argues that such testimony was relevant because it "would have shown he was more susceptible to perceive a threat and react to that threat," and "would have provided some context about [his] life as a homeless person and the dangers he experienced while living on the streets." As explained below, however, evidence that appellant suffered prior assaults by third parties he had no reasonable basis to associate with Betancourt or Diaz does not support a claim of self-defense.

In *Minifie*, our Supreme Court examined a closely related issue, namely, the extent to which evidence of threats against a defendant not by the victim, but by third parties, is admissible to support a self-defense claim. (*Minifie*, *supra*, 13 Cal.4th at p. 1055.) There, the defendant killed a person belonging to a family with a reputation for violence. (*Id*. at p. 1063.) After pleading guilty to a crime based on the killing and serving a sentence, the defendant was released from prison. (*Ibid.*) Upon entering a bar, he encountered an unarmed man wearing a leg cast due to a broken foot. (*Id*. at pp. 1060-1063.) When the man punched the defendant, the defendant responded by firing a gun at the man several times. (*Ibid*.) In the defendant's subsequent trial for assault with a deadly weapon, to support a claim of self-defense, he offered evidence that he knew his victim was a close friend of the family member he had killed, that other family members had threatened violence against him, and that the victim himself had a reputation for violence. (*Id*. at pp. 1061-1063.) The trial court barred the evidence on the ground that it constituted inadmissible character evidence. (*Id*. at pp. 1062-1063.) Our Supreme Court held the ruling erroneous, concluding that evidence of threats is admissible to support a claim of self-defense when the threats were made by members of a group who in the defendant's mind are reasonably associated with the victim. (*Id*. at p. 1065.)

In contrast, the mere fact that a defendant suffered a prior assault by a third

party, viewed in isolation, does not support a claim of self-defense. In *People v. Gonzales* (1992) 8 Cal.App.4th 1658, 1660-1661 (*Gonzales*), police officers arranged controlled purchases of heroin from the defendant in his residence. After obtaining a search warrant, they gave notice of their intention to enter the residence, and smashed the door open when they heard people running inside. (*Ibid*.) When they entered, the defendant fired a gun at them, wounding an officer. (*Ibid*.) At trial, to support a claim of self-defense, the defendant presented evidence that three days before the shooting, robbers had forced entry into his residence and robbed him at gunpoint. (*Ibid*.) He unsuccessfully requested a special instruction asserting in part: "'One who has been previously physically assaulted by another person is justified in acting more quickly and taking harsher measures for his own protection in the event of an actual or threatened assault tha[n] would be a person who had not received such prior assaults.'" (*Id*. at p. 1163.) In determining that the instruction had been properly rejected, the appellate court observed that it "could be read to state that an individual who has been previously assaulted is justified in taking harsher measures for his own protection *as to all the world* than would a person who had not been so assaulted." The court further concluded there was no authority to support "the proposition that one previously assaulted is entitled, for that reason, to shoot first and ask questions later in all situations." (*Id*. at p. 1664.)

In view of *Minifie* and *Gonzales*, any evidence appellant might have presented that he suffered prior assaults by third parties was not relevant to his claim of self-defense, absent a showing that he reasonably associated those parties with Betancourt or Diaz. We recognize that homeless persons are vulnerable, and thus often subject to violence and threats of violence. That regrettable fact, however, does not justify harsh protective measures against persons not reasonably perceived to be personally associated in some manner with the prior acts of

violence or threats of violence. In sum, appellant has shown no error in the trial court's evidentiary ruling.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.